Filed 7/15/20 Marriage of Boren CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of WESLEY R. and STEPHANIE A. BOREN.	
WESLEY R. BOREN, Appellant, v. STEPHANIE A. BOREN, Respondent.	E071999 (Super.Ct.No. FAMVS1601872) OPINION

APPEAL from the Superior Court of San Bernardino County. Guy Bovée, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Thomas E. Shinton for Appellant.

The Haynes Law Firm and Crista Haynes for Respondent.

I. INTRODUCTION

Appellant, Wesley R. Boren, appeals from the September 11, 2018 order of the family court authorizing respondent, Stephanie A. Boren, to move the parties' three

minor children to the state of Washington, where Stephanie had been living since April 2018.[1] (Fam. Code, § 3048.) The move-away order was issued following a September 10-11, 2018 trial on the move-away issue. A May 2018 family court services (FCS) mediation report concerning the move-away issue was admitted at trial.

Wesley claims the court violated his procedural due process rights by issuing the move-away order following the September 10-11, 2018 trial, without requiring Stephanie to file a pretrial request for order (RFO) seeking the move-away order. In April 2018, the court ordered Stephanie to file an RFO on her move-away request, but she never did so. Thus, Wesley claims he is entitled to a reversal of the September 11, 2018 move-away order and a new trial on the move-away issue.

We conclude Wesley forfeited this claim of procedural error by failing to object, during the September 10-11, 2018 trial, to the issuance of any move-away order on the ground that Stephanie did not file an RFO seeking the move-away order. We also conclude that the move-away order cannot be set aside, or a new trial ordered on the move-away request, because Wesley has not shown he was prejudiced by Stephanie's failure to file her RFO. Thus, we affirm the September 11, 2018 move-away order.

---

[1] Wesley also appealed from the December 17, 2018 order, adjudicating property-related issues and issuing additional orders following the September 11, 2018 move-away order. The December 17 order states that the September 11 move-away order would remain in full force and effect, except that Stephanie would pick up the minor children for their move to Washington on December 27. The December 17 order directed Stephanie to prepare a judgment. On April 25, 2019, this court dismissed Wesley's appeal from the December 17 order after he failed to respond to this court's March 29, 2019 order directing him to file a file-stamped copy of the appealable judgment with respect to the December 17 order.

II. FACTS AND PROCEDURE[2]

In June 2016, Wesley petitioned to dissolve his marriage to Stephanie, and in August 2016, the court issued preliminary custody and visitation orders concerning the parties' minor children. In October 2017, Stephanie filed an at-issue memorandum. In December 2017, the court found that the issues to be determined at trial included child custody and visitation. In March 2018, the court entered a status only judgment dissolving the parties' marriage.

On April 9, 2018, the parties appeared for what was to be a half-day court trial concerning property issues and the children's school enrollment. The trial did not proceed, however, because Stephanie was moving to Washington. Pursuant to the parties' stipulation, the court issued preliminary orders granting the parties joint legal custody, and Wesley sole physical custody, of the parties' children. Stephanie was to give Wesley seven days' notice of her intent to visit the children "as she will be living in Washington." Stephanie was ordered to "file a new request for order re: move away

[2] The record on appeal does not include a reporter's transcript of the September 10-11 trial, the September 11 order on the move-away order, or the FCS mediation report, which was admitted at trial. The record includes the register of actions; Wesley's RFO or motion to set aside the September 11 move-away order, and for a new trial on the move-away order; Stephanie's opposition to Wesley's motion; the December 17, 2018 minute order; Wesley's notice of appeal and notice designating the record on appeal; the superior court clerk's affidavit regarding Wesley's notice designating the record on appeal; and Stephanie's notice designating the record on appeal. The record also includes reporter's transcripts of proceedings conducted on September 11, 2018 (oral pronouncement of move-away order), November 14, 2018 (initial hearing on Wesley's motion), December 11, 2018 (further hearing on Wesley's motion) and December 17, 2018.

issue" and was authorized to appear by phone on her "move away" RFO. The parties were referred to FCS. Stephanie never filed an RFO on her move away request.

On June 25, 2018, the court set a court trial for September 10, 2018, on several issues including child custody and visitation. The trial was conducted during the afternoons of September 10 and 11, 2018. The parties waived the court reporter. Thus, the record does not contain a reporter's transcript of the September 10-11 trial. But the record includes a reporter's transcript of the court's September 11 oral pronouncement of its order granting Stephanie's move-away request, made immediately following the unreported September 10-11 trial.

On September 11, 2018, the court explained its decision to grant Stephanie's move-away request. The court first pointed out that the move-away decision was very difficult for the court to make because both parties were "very good parents" and their children loved them dearly. The court said it had considered the report that the parties' oldest child, then age 11, had made to FCS, together with the child's wish to live primarily with Stephanie. The court noted that the parties' two other children were too young for their wishes to be considered.

The court then pointed out that the prior child custody and visitation orders in the case were temporary orders, and that the standard of proof at trial was therefore the "best interests" standard. The court also said it had considered "all of the move away factors" identified in the FCS report. The register of actions indicates that the FCS report concerned a May 21, 2018 FCS mediation. The register of actions also shows that, at

trial, petitioner Wesley presented his case-in-chief, followed by respondent Stephanie's presentation of her case.

On September 11, 2018, the court further ordered that the children would remain in California with Wesley through their school's fall semester, but would visit Stephanie during the fall break, then would move to Washington during the Christmas break. Wesley's counsel then advised the court that Wesley would be moving to Washington to be near his children. The court deferred making a final "visitation/time" order pending Wesley's and the children's move to Washington, but noted that "the intention would be to return back to an equal time share." The court set a status hearing in December 2018 to address visitation.

In October 2018, Wesley filed an RFO to set aside the move-away order and for a new trial on the move-away issue. At a November 14, 2018 hearing on Wesley's RFO, the court said that its tentative decision was to grant Wesley's request for a new trial, given that Stephanie did not file an RFO on her move away request as the court had ordered. The court said that Stephanie's RFO "was the mechanism by which the court was going to address the custody and visitation issues, specifically the move away." But the court then asked the parties' counsel whether Wesley had not *waived* his right to proceed by way of Stephanie's RFO, given that "*we went into the trial knowing that this was going to be a move-away trial*." (Italics added.)

In response, Stephanie's counsel pointed out that Wesley's "entire trial brief" had discussed whether the move-away order should be granted.[3] In addition, the FCS mediation report, which was admitted at trial, "was specific to the move away" and "spoke to each one of the individual factors regarding the move away." Counsel argued that a new trial on the move-away issue would be "a complete waste of time" because "nothing new could possibly be presented."

Wesley's counsel argued that Stephanie's failure to file a pretrial RFO on the move-away issue prejudiced Wesley because it materially affected the manner in which he presented Wesley's case at trial. Counsel explained that at trial he *mistakenly* believed that the court had previously issued *final* orders awarding the parties joint physical and joint legal custody of the children, rather than preliminary custody orders.[4] Thus, he did not present Wesley's case "as the primary caretaker" or pursuant to a "best interest factors prejudgment analysis." Rather, he presented it "from really a postjudgment point of view." He maintained that, if Stephanie had filed an RFO on the move away issue, he would have known that there were only temporary custody orders in place and he would have presented his case "so much differently."

---

[3] Wesley's trial brief is not part of the record on appeal.

[4] Wesley's counsel was apparently referring to December 2017 temporary orders for joint legal and joint physical custody. Stephanie's counsel pointed out that the parties later (in April 2018) agreed to allow Wesley to have temporary sole physical custody of the children "to get us to trial to deal with the issue of the move away and the custody and visitation arrangements that needed to be made based on the new circumstances" of Stephanie's move to Washington.

The court and Stephanie's counsel pointed out that, before trial, the parties did not agree to any final custody orders. Again, the court asked Wesley's counsel why it should not deem Wesley to have *waived* the filing of Stephanie's RFO on the move-away issue when the parties knew the trial would be about Stephanie's move-away request. Again, Wesley's counsel argued that Stephanie's failure to file her RFO prejudicially affected the way he presented his evidence. He acknowledged, however, that, during closing arguments, he and Stephanie's counsel stipulated that the best interests standard applied to the move-away determination, and both counsel addressed the best interests standard in their closing arguments. Stephanie's counsel emphasized that, given the FCS mediation, Wesley had "advance notice" of all of the issues and evidence to be discussed at trial. Stephanie's counsel also noted that Wesley's counsel was not claiming he had any *new evidence* to present, and that all of the relevant evidence concerning the move-away issue was presented at trial.

Near the conclusion of the initial November 14, 2018 hearing on Wesley's RFO, the court asked the parties to file additional points and authorities on the waiver or forfeiture issue, and the parties did so.[5] Following a continued hearing on December 11, 2108, the court denied Wesley's RFO to set aside the September 11, 2018 move-away order and for a new trial. Wesley appeals from the September 11, 2018 move-away order.[6]

---

[5] Stephanie's further points and authorities are part of the record on appeal. Wesley's are not.

[6] See footnote 1, *ante*.

III. DISCUSSION

In this appeal from the September 11, 2018 move-away order, Wesley claims the court violated his procedural due process rights to notice and an opportunity be heard on Stephanie's move-away request during the September 10-11, 2018 trial. This procedural error occurred, he claims, because the court granted Stephanie's move-away request without requiring her to file an RFO on her move-away request before trial, as she was ordered to do in April 2018. He argues this error entitles him to a reversal of the September 11 move-away order and a new trial on the move away issue.

Wesley has forfeited this claim of error by failing to object to Stephanie's failure to file her RFO at the time of trial, and to request a continuance of the trial, if he was not ready to proceed without Stephanie's RFO. It is settled that, "where a situation arises which might constitute legal surprise [warranting a new trial], counsel cannot speculate on a favorable verdict. He must act at the earliest possible moment for the 'right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause.' [Citations.]" (*Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.)

Likewise, or more generally, a party will be deemed to have waived or forfeited a claim of error on appeal, *including a claim of procedural error*, unless the party raised an appropriate objection to the error in the trial court. (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948-949.) Thus, in *Cushman v. Cushman* (1960) 178 Cal.App.2d 492 (*Cushman*), the defendant waived or

forfeited his right to complain on appeal that the lower court erroneously awarded his former spouse, the plaintiff, $1 a month in alimony, when the matter of alimony was neither mentioned nor prayed for in the plaintiff's complaint. (*Id*. at pp. 494, 498-499.)

The defendant in *Cushman* proceeded to trial on the complaint and did not object when the plaintiff's counsel advised the court that the parties had agreed that the plaintiff would be awarded $1 a month in alimony until further order of court. (*Cushman*, *supra*, 178 Cal.App.2d at pp. 494-495.) The *Cushman* court acknowledged that, "where a divorce decree is entered by default, alimony may not be granted if not prayed for in the complaint." (*Id*. at p. 496.) "But when, as here, an appearance has been made by [the] defendant, he and his counsel are both present at the trial and actively participate therein . . . there is no need for his protection against undue advantage . . . . Defendant, present and properly represented, has knowledge of what takes place at the hearing, [and] is in a position to object to that which he deems improper . . . ." (*Id*. at pp. 496-497.)

Similarly here, Wesley proceeded to the September 2018 trial on Stephanie's move-away request, knowing full well that the move-away request would be adjudicated during the trial *and* that Stephanie had not filed an RFO on her move-away request. The parties' May 2018 FCS mediation focused on the move-away issue, and the mediator's report was admitted into evidence during trial. By failing to object during trial to Stephanie's failure to file her RFO, Wesley speculated on a favorable verdict. He gambled that the court would deny Stephanie's move-away request, but he lost. He has therefore waived or forfeited his right to claim on appeal that he was surprised by

Stephanie's failure to file her RFO and that he is entitled to a new trial. (*Kauffman v. De Mutiis*, *supra*, 31 Cal.2d at p. 432; *Cushman*, *supra*, 178 Cal.App.2d at pp. 494-499)

Additionally, Wesley has not shown that he was prejudiced by Stephanie's failure to file her RFO or that a different result was probable had the RFO been filed. Thus, we are required to disregard the procedural error or defect in the proceedings brought about by Stephanie's failure to file her RFO. (Cal. Const., art. VI, § 13;[7] Code Civ. Proc. § 475.[8]) Indeed, Wesley has not shown that Stephanie's failure to file her RFO caused his counsel's confusion concerning whether the best interests standard applied to the move-away determination. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1087; Fam. Code, §§ 3011, 3020.) To the contrary, the record shows that Wesley's counsel's confusion was due to his own unwarranted, mistaken belief that permanent joint custody orders were in place at the time of trial. Stephanie's failure to file her RFO did not cause that confusion. It is also speculative to argue, and difficult to see how, an RFO on the

---

[7] Article IV, section 13 of the California Constitution provides: "No judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[8] Code of Civil Procedure section 475 provides: "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

move-away order would have disabused Wesley's counsel of his mistaken belief that permanent custody orders were in place at the time of trial.

Wesley has also not shown that Stephanie's failure to file her RFO caused him any other prejudice, or that a different result was probable had Stephanie filed her RFO. (Code Civ. Proc., § 475.) The record shows that, during closing arguments at trial, the parties' stipulated that the best interests standard applied to the move-away determination, and each counsel addressed the best interests standard during their closing arguments. The record also shows that all of the relevant evidence concerning the move-away issue, and whether relocating to Washington with Stephanie was in the children's best interests, was presented during the trial. Wesley does not claim that he would have presented any additional evidence had Stephanie filed her RFO before trial.

Citing *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, Wesley argues: "It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend." But as the *Mullane* court observed: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . *But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied*." (*Mullane*, at pp. 314-315, italics added.) Here, the record clearly shows that Wesley's due process rights to

notice and an opportunity to be heard on Stephanie's move-away request were satisfied. As we have discussed, the record indisputably shows that Wesley knew, before trial, that the move-away issue would be adjudicated during the trial. The FCS mediator's report, which was available to Wesley before trial, also apprised Wesley of the evidence that would be presented and discussed during the trial on the move-away request.

IV. DISPOSITION

The September 11, 2018 order authorizing Stephanie to relocate and move the parties' three minor children to Washington state is affirmed. Stephanie shall recover her costs on appeal. (Cal. Rules of Court, rule, 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.